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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-239

OTIS R. BOWEN, etc., *et al.*,

Petitioners,

vs.

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

RESPONDENTS' BRIEF IN OPPOSITION.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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RESPONDENTS' BRIEF IN OPPOSITION.

Respondents respectfully request that the Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on May 16, 1979, affirming the judgment of the United States District Court for the Southern District of Indiana entered on September 5, 1978.

Opinions Below.

The opinion of the United States Court of Appeals for the Seventh Circuit is set out in the Petition at A-1–A-5, and reported at 600 F.2d 667 (7th Cir. 1979). The Findings of Fact and Conclusions of Law,

and the Summary Judgment Granting Permanent Injunction of the United States District Court for the Southern District of Indiana are set out in the Petition at A-6–A-20, and reported at 456 F.Supp. 437 (S.D. Ind. 1978).

Question Presented.

Whether the Indiana State Fair may, consistently with the first and fourteenth amendments to the United States Constitution, prohibit members of a religious society from engaging in their required religious practice of distributing religious literature and soliciting donations for support of their church in the portions of the Fair grounds open to the general public, except on condition that such activity be limited to the physical confines of a rented "booth", where the Fair presented no evidence tending to justify such a restriction.

Statement of the Case.

This action was commenced on August 25, 1977, when respondents, plaintiffs below, sought declaratory and injunctive relief pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§2201-02 with respect to the enforcement as to them of a resolution of the Indiana State Fair Board. The matter was tried upon a set of stipulated facts.[1]

The plaintiffs were the International Society for Krishna Consciousness, Inc. (hereinafter, "ISKCON"), a New York non-profit religious corporation and a member thereof, Tyari Mohan Das, on behalf of themselves and all ISKCON members. ISKCON is an inter-

[1]The Stipulation of Facts ("Stip.") is reproduced as Appendix "A" hereto.

national religious society which espouses the religious and missionary beliefs of Hinduism as expressed by that Hindu denomination known as Krishna Consciousness, a branch of the religion which is founded upon the absolute supremacy of a single god or deity, the Sanskrit name of which is "Krishna". The antecedents of this monotheistic, fundamentalist religion are ancient and pre-date Christianity. Stip. 1, 12 (Appendix "A"). *See, e.g., International Society for Krishna Consciousness, Inc. v. Kearnes,* 454 F.Supp. 116, 118 (E.D. Cal. 1978); *International Society for Krishna Consciousness, Inc. v. Wolke,* 453 F.Supp. 869, 872 (E.D. Wis. 1978).

The plaintiffs are dedicated to missionary evangelism, the education of the general public as to their religious beliefs by person-to-person conversation and dissemination of information and literature in public fora throughout the world. Indeed, the Krishna Consciousness religion imposes upon its members the duty to engage in an evangelical ritual known as *sankirtan,* which consists of going out into public places and disseminating religious literature and soliciting contributions for the support of Krishna Consciousness. *Sankirtan* is directed to the spreading of religious truth as it is known to Krishna Consciousness adherents, the attraction of new members, and the support of ISKCON's religious activities. Contributions received during the practice of *sankirtan* are the principal means of support of this religious movement. Stip. 13. *See, e.g., International Society for Krishna Consciousness, Inc. v. City of New Orleans,* 347 F.Supp. 945, 946-47 (E.D. La. 1972).

The governance of the Indiana State Fair is established by state statute. Ind. Code §15-1-1 *et seq.* (1976). The Fair is located upon an area some 238

acres in size within the County of Marion, Indiana, and contains approximately fifty-three permanent buildings. In 1977 it was attended by more than one million three hundred thousand persons. The parties agreed that the Indiana State Fair grounds constitute a "public forum" in the context of the first and fourteenth amendments. Stip. 9, 11, 16, 23.

Pursuant to their religious duty to engage in *sankirtan*, plaintiffs sought permission to distribute religious literature, to proselytize on behalf of their religion, and to solicit contributions for support of their church at the 1977 Indiana State Fair. In their correspondence with Fair officials, plaintiffs made it clear that their request was not for "booth" space at the Fair, but instead for permission "to circulate in public areas of the fair while courteously approaching patrons to distribute religious literature and request and accept contributions" (emphasis deleted). On July 8, 1977, plaintiffs were advised that, while they could apply for "booth" space, they would not be permitted to engage in their sought activity at large on the fairgrounds; that is, plaintiffs could perform *sankirtan*, if at all, only from the confines of a previously rented "booth". The Fair's policy in this regard was reaffirmed by a resolution adopted on August 19, 1977, the text of which is reproduced at pages 3-4 of the Petition. Stip. 14, 15, 20.

The action was filed six days later, and, on that day, August 25, 1977, the district court, William E. Steckler, C.J., granted plaintiffs' motion for a temporary restraining order against enforcement of the resolution. Pursuant to that order, plaintiffs were permitted to engage in their sought activities of literature distribution, proselytization, and solicitation of donations at the 1977 Indiana State Fair. Stip. 24.

On March 15, 1978, the parties filed cross-motions for summary judgment. On September 5, 1978, the district court granted plaintiffs' motion and denied that of the defendants, and, on the same day, issued its Findings of Fact and Conclusions of Law. *International Society for Krishna Consciousness, Inc. v. Bowen*, 456 F.Supp. 437 (S.D. Ind. 1978), Petition at A-6. It concluded that

> under any test applied to restrictions on expression, the Indiana Fair rule is not sufficiently, narrowly, and precisely related to the interests advanced by the State. To prohibit plaintiffs from engaging in all first amendment protected expression in all public areas of the State Fair except in a specific booth in a specific building is a device too remotely related to the achievement of any governmental purpose to withstand constitutional scrutiny under any test which might be applied.

Id. at 444, Petition at A-20.

The district court's judgment granted the injunction sought by plaintiffs, but placed four "conditions" thereon. The court required that plaintiffs (1) wear "standard ISKCON I.D. cards . . . in a visible manner"; (2) not "express" that their activities are "sponsor[ed] and/or connected" by or with "any organization other than

ISKCON"; (3) "not engage in any deliberate touching of unconsenting persons"; and (4) "not perform their activities" in certain specified places and situations "unless prior unsolicited consent is expressed". *Id.* at 445, Petition at A-7. Plaintiffs interposed no objection to these conditions.

On defendants' appeal, the judgment was affirmed by a unanimous Seventh Circuit panel, Wilbur F. Pell, Jr., Philip W. Tone, and George N. Leighton, JJ. *International Society for Krishna Consciousness, Inc. v. Bowen*, 600 F.2d 667 (7th Cir. 1979), Petition at A-1. The court of appeals held that "the interests urged [by the defendants] do not justify the restriction. Furthermore, the consideration of these interests in combination does not change our decision." *Id.* at 669, Petition at A-2. However, the court emphasized that it was

> affirming the injunction on the basis of the record before the district court. Sound judicial discretion may call for modification of this decree in the future, if the circumstances, whether of law or fact, in effect at the time of its issuance should change.

Id. at 670, Petition at A-5.

REASONS WHY THE WRIT SHOULD BE DENIED.

1. The decision of the court of appeals did not decide any significant questions of federal law, but it instead correctly applied well-settled "time, place, and manner" principles and properly concluded that the regulation at issue could be justified under them.

2. The decision of the court below does not conflict with any decision of another court of appeals so as to warrant review by this Court.

SUMMARY OF THE ARGUMENT.

The petition for a writ of certiorari fails to demonstrate any basis for granting the writ, and does not even discuss, much less distinguish, the well-reasoned opinions of the district court and of the Seventh Circuit. The case was a challenge by an evangelistic religious society to a "time, place and manner" regulation, which confined proselytizing and other expression to a "booth" at the Indiana State Fair, thereby impermissibly abridging free speech and the free exercise of religion. In the stipulated facts which underlay cross-motions for summary judgment, the religious nature of the International Society for Krishna Consciousness and its proposed activities was firmly established, but absolutely no facts were demonstrated which tended to validate the Indiana Fair rule.

Both the trial court and the Seventh Circuit correctly applied the test articulated in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) and *Grayned v. City of Rockford*, 408 U.S.

104 (1972), to the unique facts of the case. Carefully following these decisions, the courts below weighed the governmental interests against the Fair rule's infringement of expression, finding that the asserted governmental concerns were unsupported by the evidence; that, even to the extent they might be supported, the justifications for the rule were not substantial or compelling; and that obvious, less-restrictive alternatives were available to the Indiana Fair which would have been far more narrowly tailored to the governmental interests. The Petition does not dispute that the correct legal standard was applied; it simply recites precisely the same alleged interests which were thoughtfully considered and rejected by the trial court and the Seventh Circuit.

Finally, the decision of the Fifth Circuit in *International Society for Krishna Consciousness, Inc. v. Eaves,* 601 F.2d 809 (5th Cir. 1979) does not conflict with the decision of the Seventh Circuit in the present case. Although superficially similar, insofar as in both cases, activities of the International Society for Krishna Consciousness were confined to a booth, the cases are procedurally and substantively different, and, in fact, apply the same legal principles. *Eaves* affirmed, on an abuse of discretion standard, the denial of a preliminary injunction against a rule at the Atlanta airport which confined only certain defined non-communicative activity to a booth, but permitted religious expression, including the solicitation of funds, at large in the Atlanta airport lobby. The decision was based upon a clear and unrebutted evidentiary showing that the regulation served a compelling governmental interest as well as upon the fact that the law did not regulate expression per se.

ARGUMENT SUPPORTING REASONS FOR DENYING CERTIORARI.

The Petition for Certiorari Should Be Denied Because the Decision of the Court of Appeals Correctly Applied "Time, Place, and Manner" Principles Long Settled by This Court and Because It Does Not Conflict With Any Decision of Another Court of Appeals.

Petitioners' arguments in favor of allowing the writ in the present case proceed from the notion that the opinion of the Seventh Circuit is in conflict with *Cantwell v. Connecticut,* 310 U.S. 296 (1939). This position is fallacious.

In *Cantwell,* the Court invalidated a state statute which conditioned the ability to engage in religious or charitable solicitation upon a finding by an administrative official that the applicant's cause " 'is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity. . . .' " *Id.* at 302. The Court held that the statute amounted to "a censorship of religion as the means of determining its right to survive. . . ." *Id.* at 305. The reason for this holding was the Court's conclusion that the test embodied in the Connecticut law in effect vested discretionary power in the licensing official to grant or deny applications for permission to solicit funds.

> He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion.

Id.

Thus, the holding of *Cantwell* is of a piece with the Court's long and consistent line of decisions, *e.g.*, *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Schneider v. New Jersey*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938), striking down laws which grant "officials . . . unbridled discretion over a forum's use". *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). *See Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976).

That holding is, of course, of no moment in the instant case. Petitioners, rather, rely on certain statements made in dictum in *Cantwell* in which the Court broadly adumbrated areas in which regulation of activities protected by the first amendment, such as solicitation of donations on behalf of a religious cause, might be constitutionally acceptable. One of these areas was described as follows:

> Without doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent.

Id. at 306 (footnote omitted).

Further, said the Court,

> [t]he state is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, place, comfort or convenience.

Id. at 307.

The Court in *Cantwell* noted that identification requirements and "time, place and manner" regulations, unlike standardless licensing laws, are not per se unconstitutional. Most emphatically, however, the Court did not, as petitioners appear to assume, suggest that such restrictions are always valid, and it could not have done so, since no law of that description was there before the Court. Rather, definition of perimeters of permissible regulations in these areas was left entirely to later decisions.

Under the "time, place and manner" rubric, petitioners seek reversal of the judgment of the court of appeals in this case.[2] The decision below, however, is well within the constitutional guidelines established by the Court in cases since *Cantwell* in which "time, place and manner" considerations were actually raised.

For example, in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Court held inconsistent with the first amendment the actions of school officials in suspending from classes three students who protested the federal government's policy in Vietnam by wearing black armbands in knowing violation of a regulation prohibiting the wearing of any armbands by pupils attending school. The Court stated that

> [u]nder our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom

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[2]*Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976), provides a recent example of a law invalidated by the Court which was grounded upon the "identification" branch of the *Cantwell* dictum. Indeed, on its face, the ordinance in *Hynes* fell literally within the *Cantwell* language. "Those covered by [the] ordinance [were] required only to 'notify the Police Department in writing, for identification only.'" *Hynes v. Mayor of Oradell, supra* at 613. Notwithstanding this apparent congruence, the ordinance was unconstitutional for its "failure to explain what 'identification' is required. . . ." *Id.* at 622.

> of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

Id. at 513.

The Court further made clear that a regulation of this kind, even in the public school context in which courts frequently defer to the presumably informed and expert judgment of the operating local authorities, *see id.* at 507, would not be permitted absent a narrowly defined demonstration and finding of fact justifying the restriction.

> Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.

Id. at 509.

Mere speculation as to the effect of the prohibited "manner" of expression was an insufficient basis for its restrictions. Indeed, the district court in *Tinker* upheld by an equally divided Eighth Circuit, had "concluded that the action of the school authorities was

reasonable because it was based upon their fear of a disturbance from the wearing of the armbands". *Id.* at 508. The Court had no difficulty in disposing of this finding.

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. . . . But our Constitution says we must take this risk. . . .

Id. at 508.

Viewing *Tinker* as a touchstone for analysis, the Court in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), comprehensively set out the law governing analysis of "time, place and manner" regulations of first amendment-protected activity.

First, *Grayned* set the framework by making clear that a purported "time, place and manner" regulation of speech is overbroad and therefore facially unconstitutional "if in its reach it prohibits constitutionally protected conduct". *Id.* at 114 (footnote omitted). "The crucial question . . . is whether the ordinance sweeps within its prohibition what may not be punished under the First and Fourteenth Amendments." *Id.* at 114-15.

Grayned also supplies the tools for making this determination in a given case. Although "reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests, and are permitted," *id.* at 115 (footnotes omitted), the concept of "reasonableness" takes on a special coloration in this context.

> Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily

> the fact that communication is involved; the regulation must be narrowly tailored to further the State's legislative interest. Access to the "streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly. . . ." Free expression "must not, in the guise of regulation, be abridged or denied."

Id. at 116-17 (footnote omitted) (bracketed material and ellipses in the original).

Grayned involved an ordinance dealing with disturbances of the peace on or near school premises. That enactment, while arguably affecting protected speech, referred only to the making of a "noise or diversion". Moreover, it was carefully limited in time and place to "grounds adjacent to any building in which a school . . . [was] in session. . . ." *Id.* at 107-08. Finally, the ordinance purported to apply only to certain limited circumstances, where the "noise or diversion . . . disturbs or tends to disturb the peace or good order of such school session. . . ." *Id.* at 108.

This Court upheld this focused, narrow ordinance, but in doing so made clear that a law *dehors* such bounds would be beyond the constitutional pale. Of the Rockford ordinance, the Court said that

> Rockford's anti-noise ordinance goes no further than *Tinker* says a municipality may go to prevent interference with its schools. It is narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning, and does not unnecessarily interfere with First Amendment rights. Far from having an impermissibly broad prophylactic

> ordinance, Rockford punishes only conduct which disrupts or is about to disrupt normal school activities. That decision is made, as it should be, on an individual basis, given the particular fact situation. Peaceful picketing which does not interfere with the ordinary functioning of the school is permitted.

Id. at 119-20 (footnote omitted).

Other leading "time, place and manner" decisions are completely in accord with the *Grayned* analysis. In *Cameron v. Johnson,* 390 U.S. 611 (1968), for example, the Mississippi statute, while concededly reaching "picketing . . . intertwined with expression and association", narrowly proscribed such picketing only "if engaged in a manner which obstructs or unreasonably interferes with ingress or egress to or from a courthouse". *Id.* at 617. That statute, therefore, did not prohibit any " 'activity [which] bears [a] necessary relationship to the freedom to . . . distribute information or opinion.' *Schneider v. State* [308 U.S. 147, 161 (1939)]".

Similarly, the judicial obstruction statute upheld by *Cox v. Louisiana,* 379 U.S. 559 (1965), was a "precise, narrowly drawn regulatory statute which proscribes certain specific behavior". *Id.* at 562. No conviction could be had under the Louisiana law unless the trier of fact found, for example, that the defendant acted "with the intent of interfering with, obstructing, or impeding the administration of justice". *Id.* at 560.

The record in the present case, when viewed in light of the well-established principles of *Tinker* and *Grayned,* makes clear that the decision here of the Seventh Circuit amounts to nothing more than a correct

application of the law to the facts of this case. No new ground was even approached by that decision, much less broken. Moreover, as demonstrated above, the decision is not even arguably in conflict with the decision of this Court in *Cantwell v. Connecticut, supra.* In these circumstances, the case does not warrant review by this Court.

The Petition does not attempt to state special and important reasons why this Court should exercise its sound discretion to grant review on writ of certiorari. Instead, the Petition proposes six "state interests" under which petitioners seek to justify their regulation confining all first amendment activity to "booths" at the Indiana State Fair. Because the Petition in effect argues that these "interests" justify review, a brief refutation of them is appropriate.

The proposed "interests" are the same as those considered and conclusively rejected by the court of appeals. Petitioners concede that "[p]erhaps, separately, none of the [proposed justifications] constitute a compelling State Interest," but argue that "the State Interest is made up of all these things and combined they become a very compelling State Interest". Petition at 9 (capitalization in the original). This curious theory was properly rejected by the Seventh Circuit. Petitioners do not even mention, let alone attempt to overcome, the analysis engaged in by the unanimous panel.

Several of the proposed justifications, apart from the general absence of factual support in the record therefor, on their face bear not even a rational relationship to the booth regulation at issue, let alone being "narrowly tailored to further [the state's] compelling interest" as required by *Grayned. Grayned v. City of*

Rockford, supra at 119. These are the interests in "preventing frauds", "preventing littering", "public safety" (here, the alleged "safety hazard to barefooted pedestrians" from discarded flowers with "exposed straight pin[s]"), and the "prevention of battery". Petition at 9. As the Seventh Circuit understated the point with respect to the "flower" assertion, "[i]t is also unclear that requiring [respondents] to use a booth would remedy this problem," 600 F.2d at 669 n.1, Petition at A-3 n.1, or with respect to the "fraud" argument, "we have difficulty seeing a relation between the state interest in preventing fraud and confining *sankirtan* to a booth," *id.* at 670 n.2, Petition at A-3 n.2. Manifestly, inasmuch as the petitioners have expressly permitted respondents to engage in *sankirtan* at the Fair, the particular restriction in putting them into a booth would not advance any of these four stated interests in the slightest.

As to "the interest of the free flow of vehicular and pedestrian traffic," Petition at 9, the court of appeals correctly noted that the petitioners "submitted no evidence that serious disruption would result from permitting [respondents' proposed] activities". *Id.* at 669, Petition at A-2. *Tinker* and *Grayned,* of course, explicitly require a concrete demonstration of this kind in order for a particular "time, place and manner" regulation to be upheld. On this record, the proposed justification amounts precisely to "undifferentiated fear or apprehension" which is "not enough to overcome the right to freedom of expression". *Grayned v. City of Rockford, supra* at 117; *Tinker v. Des Moines Independent Community School District, supra* at 508. As in *Sherbert v. Verner,* 374 U.S. 398 (1963), "the record [does not] . . . sustain [petitioners' contention];

there is no proof whatsoever to warrant such fears". *Id.* at 407.

Finally, petitioners assert an interest in "providing to the other exhibitors and concessionaires at the Indiana State Fair an equal opportunity to display their wares and ideas without interference from wandering solicitors, vendors or distributors of literature and/or gifts who might drive potential customers away by accosting them while they stand in line". Petition at 9. Petitioners' point here, as it was below, is that operators of businesses such as novelty stands, sandwich trailers, hat stands, hot dog and other food stands, and swine exhibitors complained that the practice of *sankirtan* near their places of business distracted potential customers and diverted them from the commercial operators to the respondents.

First, even assuming that the state has a legitimate interest in preventing commercial distraction of this kind, there is no suggestion that any such interest rises to the required "compelling" level. That "mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms" is, of course, axiomatic. *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971). In any event, even assuming *arguendo* that there exists such a constitutionally cognizable interest, any such legitimate interest is fully and specifically protected by the plain language of the judgment of the district court, as affirmed by the court of appeals, which placed four "conditions" on the injunction against enforcement of the Fair resolution, one of which reads as follows:

> ISKCON members will not perform their activities with people engaged in sitting and watching a performance or other special attractions, waiting in a ticket line, coat line or refreshment line unless prior unsolicited consent is expressed.

456 F.Supp. at 445, Petition at A-7.

Accordingly, on this record, the challenged resolution may only be termed "an impermissibly broad prophylactic ordinance." *Grayned v. City of Rockford, supra* at 119. The resolution is not tailored to apply only to "disruptive" or similar activity which the state may clearly act to prevent but is instead an unjustified, across-the-board restriction on protected activity. Moreover, the proposed justifications for the resolution either are utterly unrelated to the regulation or are already fully satisfied. Petitioners' assertion that respondents' "position, when reduced to its simplist [*sic*] terms, is that the only permissible restraint is no restraint," Petition at 11, is quite inaccurate. Respondents do not contend, and, indeed, never have contended, that "no restraint" may be imposed. *Cf. International Society for Krishna Consciousness, Inc. v. Hays,* 438 F.Supp. 1077, 1080 (S.D. Fla. 1977) (plaintiffs never claimed immunity from general laws regulating conduct of persons dealing with public). Simply, petitioners have, instead of attempting to draft acceptable limitations, insisted on defending this single unjustified limitation. The district court suggested a number of permissible, narrowly drawn restrictions; others, such as an overall numbers limitations on persons engaged in protected activity at the Fair, may easily be imagined. Petitioners are fully capable of drafting and adopting these or similar constitutionally justifiable regulations, but their refusal to do so cannot justify an otherwise unjustifiable law.

Although petitioners have not sought certiorari on the ground that the judgment below is in conflict

with that of another court of appeals, since the petition was filed, the Court of Appeals for the Fifth Circuit rendered a decision which, at first glance, might tend to support the creation of such a conflict. Examination of the latter decision, however, makes clear that in fact no conflict exists.

In *International Society for Krishna Consciousness, Inc. v. Eaves,* 601 F.2d 809 (5th Cir. 1979), the district court denied plaintiffs' motion for a preliminary injunction against enforcement of an Atlanta, Georgia, ordinance regulating expressive activities at that city's airport terminal, and that denial was affirmed in part and reversed in part by the Fifth Circuit.[3] One provision of that ordinance was facially similar to the Indiana Fair resolution at issue in the present case.

Under the ordinance in *Eaves,* although literature distribution, proselytization, and even the solicitation of donations were permitted to take place at large in the airport lobby, if such a solicitation occurred, and a person decided to make a donation, the forwarding of the funds could only take place at a previously designated "solicitation booth". *Id.* at 836, 837-38. The Fifth Circuit affirmed the denial of the motion for preliminary injunction insofar as this provision was concerned. *Id.* at 826-30.

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[3]Plaintiffs-appellants in *Eaves* have filed a petition for rehearing with the Fifth Circuit panel pursuant to Fed.R.App.P. 40, which petition is still pending. Thus, as of the time of this writing, the *Eaves* decision is not final. *See* Fed.R.App.P. 41(a) ("[t]he timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court"); *United States v. Healy,* 376 U.S. 75, 77-78 (1964) (petition for rehearing automatically renders judgment of court of appeals not final for purposes of time for filing petition for writ of certiorari).

Several fundamental considerations compel the conclusion that *Eaves* and the decision below in this case are not in conflict for certiorari purposes. For one, the *Eaves* decision is inherently not a final one. The ordinance there, unlike the situation here, was considered only in an interlocutory stage. This distinction is critical for two reasons. First, the burden of persuasion is notably different. Since the district court in *Eaves* had denied the preliminary injunction motion, the Fifth Circuit necessarily reviewed that decision only on an abuse of discretion standard, and that court explicitly noted as much. *Id.* at 828. Moreover, since plaintiffs there had not gone beyond a request for interlocutory relief, a more stringent showing on their part was necessary than would have otherwise been the case.

> But in this case appellants were asking for a preliminary injunction; that makes it more difficult for them to obtain relief against the solicitation booth provisions. *See, e.g., Compact Van Equipment Co. v. Leggett & Platt, Inc.,* 566 F.2d 952, 954 (5th Cir. 1978).

Second, the *Eaves* court noted that, upon remand, it would be entirely open to plaintiffs to present evidence which would require invalidation of the ordinance. *Id.* at 830. Up to that point, they had chosen not to do so, and had only "attack[ed] [the] restriction on its face. . . ." *Id.* at 826. Thus, only if such a procedure were to take place, and only if the ordinance were to be finally upheld by the Fifth Circuit, would a conflict even arguably be created. At the present tentative, interlocutory stage of the *Eaves* case, there is no true "conflict in the circuits" ripe for resolution by this Court. No necessity has yet ap-

peared so as to require the exercise of this Court's power of review.

In any event, the substantive scope of the Atlanta ordinance is markedly different from that of the Indiana resolution here considered. The Atlanta restriction at issue in *Eaves* permitted the dissemination of literature and the solicitation of donations throughout the Atlanta airport lobby, and restricted to a "booth" only the physical transfer of money. Finding that the Atlanta ordinance applied only to the "mechanical, noncommunicative aspects of transferring money," the court found that the regulations faced a lower first amendment hurdle. *Id.* at 828. By contrast here, of course, the Indiana enactment applies broadly to the clearly protected activities of the "distribution of literature or solicitation of donations," neither of which was even implicated by the *Eaves* ordinance.

Further, the evidence in *Eaves* at the hearing of the preliminary injunction consisted of the uncontroverted affidavit of the airport manager, who specifically pointed to serious problems caused by the mechanical exchange of money. *Id.* at 829. Explicitly noting the appellants' opportunity to challenge the affidavit at trial, the court even went so far as to suggest the direction the rebuttal might take. However, given the state of the evidence and the deference to be accorded the trial court's denial of the preliminary injunction, the booth limitation was upheld. *Id.* at 829-30.

The evidence presented in *Eaves,* the affidavit of the airport manager, although totally conclusory, focused on the disruption caused by exchange of money, and the regulation sustained addressed only that activity. In the present case, no specific, competent evidence was introduced which supported the Fair regulations. Instead, the state interests asserted were speculative, and the availability of less-restrictive alternatives apparent.

Finally, the places to which the respective regulations apply are entirely different. Both law and common sense dictate this difference as an important distinguishing feature. As the *Eaves* court noted

> [i]n an airport—unlike a park, for example—"free movements" are likely to be almost as regular and predictable as those of people entering and leaving a building.

Id. at 831.

For first amendment purposes, the interior of an airport lobby is not truly comparable to a state fair which sprawls over some 238 acres; the latter is, indeed larger than many parks, and fulfills functions quite distinct from those of an airport. As this Court has emphasized,

> [t]he nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." Although a silent vigil may not unduly interfere with a public library, *Brown v. Louisiana,* 383 U.S. 131 (1966), making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

That the "nature" of airports and state fairgrounds and the "pattern of [their] normal activities" differ

greatly from each other should go without saying. Hence, under settled principles, no apt constitutional comparison is possible.

Conclusion.

For these reasons, the petition for a writ of certiorari should be denied.

Dated: November 2, 1979.

Respectfully submitted,

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Attorneys for Respondents.

APPENDIX "A."

Stipulation of Facts.

In the United States District Court for the Southern District of Indiana, Indianapolis Division.

International Society for Krishna Consciousness, Inc., et al., Plaintiffs, vs. Otis R. Bowen, Governor of the State of Indiana, et al. Defendants. Civil Action No. IP 77-521-C.

1. Plaintiff, International Society for Krishna Consciousness, Inc. and its members (collectively referred to hereinafter as "ISKCON"), is a duly organized not-for-profit corporation, incorporated under the Laws of the State of New York, with their main office located at 340 W. 55th Street, New York, New York 10019, and with various Temples located throughout the United States and the world. The plaintiffs, through their members (referred to as "Devotees"), seek to educate the general public as to their religious beliefs by conversing with the general public and disseminating their religious beliefs, literature and information in public forums throughout the world in the age-old form of missionary evangelism.

2. Plaintiff, Tyari Mohan Das, formerly known as Frank Lenna, is a member or Devotee of ISKCON and was distributing literature and solicting contributions at the Indiana State Fairgrounds outside the confines of a rented booth on August 18 and 19, 1977 when he was taken into custody, questioned, had his money confiscated without being given a receipt, and threatened with arrest if he continued his distribution of literature and solicitation of funds without renting a booth as other exhibitors were required to do, all at the behest of the defendants and/or their agents.

3. Defendant Otis R. Bowen is the Governor of the State of Indiana and is charged with the duty and responsibility of appointing five (5) members of and to the Indiana State Fair Board (hereinafter "Board") and is an ex-offico member of said Board with power to vote on all questions acted upon by said Board, pursuant to IC 1971 15-1-1-2.

4. Defendant Robert D. Orr is the Lieutenant-Governor of the State of Indiana and by virtue of his office is the Commissioner of Agriculture and is thereby also an ex-officio member of said Board with power to vote on all questions acted upon by said Board, pursuant to IC 1971 15-1-1-2.

5. Defendant Guy M. Beerbower was the President of the Indiana State Fair Board during the 1977 Indiana State Fair with the responsibility of calling and conducting meetings, regular or otherwise, of the Board at which meetings, policies are formulated and adopted and resolutions are passed.

6. Defendant Estel L. Callahan is the Secretary-Manager of the Board and in such capacity acts as a full-time paid employee and agent of the Board with authority and responsibility to carry out the policies and directives of the Board.

7. Defendants Dr. Howard G. Diesslin, John L. Fox, R. J. Panke, O.K. Anderson, Walter H. Barbour, Linville I. Bryant, Frederick J. Bumb, Beryl J. Grimme, Kenneth W. Harris, Gladys L. McCormick, R. Ross McKee, Robert E. McKee, Donald E. Smith, Dwight A. Smoker, Paul G. Thurston and Lola Yoder, individually and in their official capacities as members of the Board, are charged, under IC 1971 15-1-1-2, generally with responsibility for administration of the In-

diana State Fairgrounds and are charged specifically with the entire control of Indiana State Fairs, including but not limited to the administration of space allocation and the responsibility for policy formulation.

8. This Court has jurisdiction of the subject matter and over the parties herein.

9. This Court has venue in that the claim arose within the State of Indiana, County of Marion, City of Indianapolis, all within the jurisdiction of this Court.

10. The parties agree that "State Action" exists in this case within the meaning of that term in the context of civil rights actions under 42 U.S.C. §1983.

11. The parties agree that the Indiana State Fair Grounds constitute a "public forum" within the meaning of that term in the context of Amendments 1 and 14 to the United States Constitution.

12. The parties agree that the International Society for Krishna Consciousness, Inc. ("ISKCON") is not a cult but rather is an international religious society which espouses the religious and missionary beliefs of Hinduism as expressed by the Hindu denomination, Krishna Consciousness. Krishna Consciousness is the branch of Hinduism which believes in the absolute supremacy of a single God or (in Sanscrit: "Krishna"). The antecedents of this monotheistic fundamentalist Hindu religion are ancient and pre-date Christianity.

13. Hinduism as expressed by Krishna Consciousness imposes on its members the duty to perform an evangelical religious ritual known as "Sankirtan" which consists of going out into public places and disseminating and selling religious literature and solicit-

ing contributions to support Krishna Consciousness. Sankirtan is directed to spreading religious truth as it is known to Krishna Consciousness, attracting new members, and supporting ISKCON's religious activities. Donations and book sales are the very lifeblood and principle means of support of this religious movement.

14. Plaintiffs sought permission to distribute literature and to solicit and accept contributions at the 1977 Indiana State Fair by means of correspondence to and from appropriate state officials and their legal counsel, which correspondence indicated, in pertinent part:

> This is *not a request for a booth*. It is a request to allow representatives of our religious organization *to circulate in public areas* of the fair while courteously approaching patrons to distribute religious literature, and request and accept contributions. (emphasis in original)

15. On July 8, 1977, the Defendants advised the Plaintiffs that they could apply for booth space but that Defendants' policy remained the same as regards to no wandering solicitation, vending or distribution of literature being permitted on the fairgrounds. The Defendants provided the Plaintiffs with a standard exhibitor's application on July 19, 1977.

16. The Defendants herein are charged with the responsibility for the entire operation of the Indiana State Fair and the grounds and buildings thereon pursuant to IC 15-1-1-1 and IC 15-1-1-7. Pursuant to this authority, the Indiana State Fair Board has always had a policy which barred *roving* solicitation by any party and which require all persons or organizations wishing to engage in solicitation and dissemination

to procure booth space and to remain within that booth space while disseminating, selling or soliciting at the Fair. This policy was reaffirmed on August 19, 1977 by the Defendants in a resolution passed on that date.

17. Plaintiffs have not been barred access to the 1977 Indiana State Fair. Defendants herein have specifically offered access to the grounds of the Indiana State Fair during the 1977 Indiana State Fair upon the same terms and conditions as it has offered said access to all other persons and organizations seeking the same, *i.e.* within the confines of a previously rented booth.

18. Defendants by their policy and resolution are attempting to treat Plaintiffs like every other organization coming upon the Indiana State Fairgrounds for the purpose of selling or exhibiting their wares, products, merchandise and philosophy.

19. Plaintiffs, through their attorney, on August 17, 1977, had a conference with the legal counsel for the Board at which time certain conditions were discussed and agreed to in an effort to avoid the necessity of litigation and in a good faith spirit of compromises. On the following day, however, August 18, 1977, plaintiffs were taken into custody, interrogated, had their funds confiscated with no offer of a receipt, and threatened with arrest in the event that they persisted in their attempts to distribute their literature and solicit contributions in the public areas at the Fairgrounds without confining their activities to a previously rented booth.

20. Plaintiffs further attempted, in good faith, through legal counsel, to negotiate conditions with the Board's legal counsel pursuant to which they could

exercise their Constitutional rights. The Board, however, determined to and did reaffirm its current policy by Resolution passed unanimously on August 19, 1977 which reads as follows:

> Excerpt from the minutes of the meeting of the Indiana State Fair Board, held Friday, August 19, 1977:
>
> Upon motion of Mrs. Yoder, seconded by Mr. Robert McKee and unanimously carried, the following resolution was adopted;
>
> Be in resolved, that in keeping with the on-going policies of the Indiana State Fair Board to make every effort to insure that its fairgoers are assured the maximum opportunity to enjoy the Indiana State Fair, this board reaffirms its prior policy that no distribution of literature or solicitation of donations or the outright selling of literature or any other commodity shall take place anywhere except from the confines of a limited space previously rented by the board; that this policy of no wandering distribution of literature or solicitation or selling also be the on-going policy of this board throughout the entire year—even during non-fair time.

21. Plaintiff's First and Fourteenth Amendment rights, specifically the right to freedom of speech, the right to the free exercise of religion and the right to peaceably assemble are implicit in the concept of ordered liberty.

22. Defendants do not question the validity or sincerity of Plaintiffs' religious beliefs or motives.

23. Approximately 1,333,570 citizens of the State of Indiana and of the United States of America attended the 1977 Indiana State Fair on the Indiana State

Fairgrounds which is some 238 acres in size with some 53 permanent buildings located thereon.

24. Plaintiffs were admitted to the Indiana State Fairgrounds pursuant to a temporary injunction during the last three days of the Fair, August 26-28. During that time Defendants received several oral complaints concerning the conduct of the Plaintiffs in the course of the Plaintiffs' distribution of literature, solicitation of and accepting of donations. While only one fairgoer was willing to reduce his complaint to writing, several of the concessionaires were willing to do so and submitted same to the Defendants complaining in writing concerning the alleged effect of the activities of the Plaintiffs during the last three days of the Fair on the commercial activities of the concessionaires.

25. The burden of contesting the policy or resolution of the Fair Board has been placed on the Plaintiffs to pursue what they perceive to be their constitutional rights under the 1st and 14th Amendments of the United States Constitution.

DATED: March 15, 1978

/s/ Richard D. Boyle
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DATED: March 15, 1978

/s/ J. Gordon Gibbs
J. Gordon Gibbs
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